IN THE SUPREME COURT OF MISSOURI

NO. SC 85292

**RIVERSIDE-QUINDARO BEND LEVEE DISTRICT,
PLATTE COUNTY, MISSOURI**

RESPONDENT,

v.

INTERCONTINENTAL ENGINEERING MANUFACTURING CORPORATION, ESTATE OF ED YOUNG, WESLEY SEYLLER AND CAROL SEYLLER, KITTERMAN, INC., PROLOGIS TRUST AND SECURITY CAPITAL INDUSTRIAL TRUST, WILLIAMS GAS PIPELINES CENTRAL, INC., WILLIAMS PIPELINE COMPANY, L.L.C., AND WILLIAMS COMMUNICATIONS,

APPELLANTS

**ON APPEAL FROM THE CIRCUIT COURT
OF PLATTE COUNTY, SIXTH JUDICIAL CIRCUIT
DIVISION NO. 1
CASE NO. 99 CC 0930
THE HONORABLE WARD B. STUCKEY**

RESPONDENT'S SUBSTITUTE BRIEF

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Jurisdictional Statement

Jurisdiction, or more specifically, the lack of jurisdiction, is the key issue before this Court. Chapter 245 of the Missouri statutes authorizes the organization, operation and maintenance of levee districts and levee district projects such as that at hand. Chapter 245, "a code unto itself," grants all rights and fixes all responsibilities on all matters associated with a levee, including the crucial issue of allocating and funding the costs of a levee partially by assessing benefits to certain landowners. In the particular matter of the levee being constructed by the Riverside-Quindaro Bend Levee District of Platte County, Missouri (the "Levee"), the Appellants, all of whom are landowners within its boundaries, are unabashed in their displeasure over assisting in the funding of the Levee. They have characterized themselves as "unwilling" and feel that they, the landowners nearest and most benefited by the Levee, have been "yoked" with contributions to the project's funding (Appellants' Motion to Transfer, p. 4). Because they discount the benefits (or, as they state in their Motion to Transfer, "alleged" benefits) of the Levee, the Appellants are hoping to skirt their court-ordered contribution obligations and shift their share of the levee cost to their neighbors, and though they lacked any statutory authority to do so, have appealed the benefits assessments determined by the court-appointed Levee District commissioners and approved by the Circuit Court.

In a detrimental blow to the Appellants' attempt, Chapter 245 indicates exactly which issues are appropriate for appeal in a matter such at that at hand, and the assessment of benefits is not one of the appealable issues. The Western District Court of Appeals properly

declined to hear this appeal. Appellants have now turned to this Court for help in their attempt to shift their financial responsibilities. This Court should resist this invitation to ignore proper statutory construction and binding case law, and should reject the Appellants plea for further review.

1. **The Right to Appeal is Granted by Statute, and the Statute in Question, a "Code Unto Itself," Does not Grant a Right to Appeal the Issue Asserted by Appellants**

Though they are attempting to conceal their principal objective in a cloak sewn of allegations concerning summary proceedings which were too summary and new concerns about deprivations of constitutional rights, the true hope of the Appellants is that this Court throw out the Commissioners' assessment of benefits to these Appellant-property owners. The Appellants' wish cannot be granted, however, as no authority exists for this appeal.

It is well-settled in Missouri that "'[t]he right to appeal is purely statutory and, where a statute does not give a right to appeal, no right exists.'" *Farinella v. Croft*, 922 S.W.2d 755, 756 (Mo. 1996) (*quoting Christman v. Richardson*, 818 S.W.2d 307, 308 (Mo. App. 1991)); *see also City of Richmond Heights v. Board of Equalization of St. Louis County*, 586 S.W.2d 338, 342 (Mo. 1979) (stating "the right to seek judicial review depends upon its express authorization by either a statute or rule"). "'An appellate court lacks jurisdiction to hear an appeal if it is not authorized by statute.'" *Kansas Ass'n of Private Investigators v. Mulvihill*, 35 S.W.3d 425, 428 (Mo. App. 2000) (*quoting Schulze v. Erickson*, 17 S.W.3d 588, 590 (Mo. App. 2000)).

This levee district matter is specifically and completely controlled by Chapter 245 of the Revised Missouri Statutes. This Court has long recognized that specialized statutes such as Chapter 245 are "a code unto itself," *State ex rel. Powell v. Capps*, 381 S.W.2d 852, 855 (Mo. 1964),[1] and that such a statute "fixes the rights and liabilities of all" as to the matters addressed by the statute. *Dalton v. Fabius River Drainage Dist*., 184 S.W.2d 776, 784 (Mo. App. 1945). Chapter 245, as does Chapter 242, grants and withholds power and authority as specifically and expressly provided therein. *See In re Tri-County Levee Dist.,* 42 S.W.3d 779, 787 (Mo. App. 2001). Despite the Appellants' imploration to the contrary, this Court must not disregard a statutory provision which governs and determines the rights of these parties. *McGhee v. Dixon*, 973 S.W.2d 847, 849 (Mo. 1998).

Section 245.130, RSMo., specifically addresses exceptions to the Commissioners' Report and the issue of appeal from a judgment by the court confirming the same.

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[1] The *Powell* case concerns drainage districts which are authorized and controlled by Chapter 242. This Court has recognized that the provisions of Chapter 245 and Chapter 242 are "substantially the same," *J.A. Bruening Co. v. Liberty Landing Levee Dist.*, 475 S.W.2d 125, 126 (Mo. 1972), and Missouri courts have used case law interpreting Chapter 242 drainage district provisions to interpret Chapter 245 levee district issues. *See, e.g., In re Tri-County Levee Dist*., 42 S.W.3d 770, 787 (Mo. App. 2001). This concept is further addressed in subsection 3 of the Jurisdictional Statement portion of this Brief, and the Appellants have also invoked drainage district provisions in making their arguments (s*ee, e.g*., Appellants' Brief, p. 2 n.2).

According to the statute, after the court has confirmed a Commissioners' Report, as was done in this matter, the following rules apply to appeals:

> **Any person may appeal from the judgment of the court, and upon such appeal there may be determined either or both of the following questions: (1) Whether just compensation has been allowed for property appropriated; and (2) Whether proper damages have been allowed for property prejudicially affected by the improvements.**

§ 245.130.4(1) and (2), RSMo. (2001). This statute clearly and specifically establishes the only questions which are appropriate for appeal, and does not include the assessment of benefits. Furthermore, the statute in no manner indicates a legislative intent to make available an appeal on the issue of the assessment of benefits. Although the Appellants are soliciting this Court to imply a right to appeal (Motion to Transfer 4), no implication is necessary because the statute which wholly addresses all levee district matters expressly declares when a right to appeal exists. "Courts may not 'read into a statute a legislative intent contrary to the intent made evident by the plain language.'" *American Standard Ins. Co. v. Hargrave*, 34 S.W.3d 88, 90 n.7 (Mo. 2000) (*quoting Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622, 624 (Mo. banc 1995)). This prohibition against broadly construing legislative intent applies "'even when the court may prefer a policy different from that enunciated by the legislature.'" *Keeney v. Hereford Concrete Products, Inc.*, 911

S.W.2d 622, 624 (Mo. banc 1995) (*quoting Kearney Special Road Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993)).

2. When Construing A Statute, the Express Mention of One Issue Implies Exclusion of Another, Thus Section 245.130.4 Should be Construed to Exclude All Non-Identified Issues for Appeal in Order to Comply with the Rule of Construction and to Maintain the Relevancy of the Statute

The Appellants contend that Chapter 245 does not proscribe benefits assessment appeals, but is instead "simply silent as to such appeals." (Appellate's Brief, p. 5). This interpretation of the statute is simply incorrect. Section 245.130.4 clearly states that "either or both" of the identified issues may be appealed. It does not state that those two issues for appeal are "in addition to" other appropriate issues, are "among" those which a court should hear, or are "examples" of the issues available for appeal. If the legislature did not intend to limit the appeals to those two particular issues, why did it identify them exclusively ? The Appellants offer no logical explanation as to why the legislature would specify certain issues as appropriate for appeal but leave the door open to other, though unspecified, issues. As stated by the Western District, it is logical to assume that the specific questions identified in the statute were intended to be the sole and exclusive questions that could be raised on appeal. "A standard rule of statutory construction is that the express mention of one thing implies the exclusion of another." *Groh v. Ballard*, 965 S.W.2d 872, 874 (Mo. App. 1998) (*citing Yellow Freight Systems, Inc. v. Mayor's Commission on Human Rights of City of Springfield*, 791 S.W.2d 382, 387 (Mo. banc 1990)).

Not only does the Appellants' interpretation lack any logical foundation, but if it were accepted, Section 245.130.4 would be rendered impotent as it is also silent as to any other issue which an obstreperous landowner could dream up for appeal regarding the circuit court's confirmation, including the appointment of certain commissioners, the drawing of a levee's boundaries, the design of the levee, or the original organization of the district. This interpretation would make the matters for appeal limitless and the subject Section restricting the same irrelevant. Such an outcome gives rise to the unreasonable and absurd result that the rules of statutory construction abhor. *See, e.g., State ex rel. Dravo Corp. v. Spradling*, 515 S.W.2d 512, 517 (Mo. 1974); *see also Burch Food Services, Inc. v. Missouri Div. of Employment Sec.*, 945 S.W.2d 478, 480-81 (Mo. App. 1997) (stating "the court should not construe the statute so as to work unreasonable, oppressive or absurd results").

The legislature's clear limitation of the issues to the two specifically cited also undermines the Appellants' contention that Section 512.020 grants them a right to appeal. (App. Brief 405). As stated by the Appellants, Section 512.020 grants a right to appeal unless the appeal is "clearly limited" by statutory proceedings. § 512.020, RSMo. (2000). It is counterintuitive to suppose that the legislature would take the opportunity to list two very specific issues as appropriate for appeal within a very specialized area of the law, and would do so with the intent that all other issues are also up for appeal. Again, this would render Section 245.130.4 meaningless, and the overriding policy is to avoid such results. Because the legislature may not be charged with having done a meaningless act, this Court

must give credence to the limiting language used in Section 245.130.4. *Staley v. Mo. Dir. of Revenue,* 623 S.W.2d 246, 250 (Mo. banc. 1981) (*quoting State ex rel. Thompson-Sterns-Roger v. Schaffner,* 489 S.W.2d 207 (Mo.1973)). The relevance of Section 512.020 is further undermined by the fact that Section 245.130.4 more specifically addresses the matter at hand. When the same subject matter is addressed in general terms in one statute and in specific terms in another, the more specific controls over the more general; therefore, the more specific Section 245.130.4 trumps the more general statute. *Greenbriar Hills Country Club v. Dir. of Revenue,* 623 S.W.2d 346, 352 (Mo. banc. 2001).[2]

3. Missouri Courts Have Consistently Interpreted the Subject Statute in Limiting the Issues Available for Appeal, and the Supreme Court Has Not Seen Fit to Overrule Its Determination that Benefits Assessments are Excluded

The statutory language is quite plain as to the two issues which are appropriate for appeal in this matter, and this Court need not imply or hazard a guess as to whether the legislature meant to include other questions for appeal and inexplicably failed to designate

[2] The Appellants also claim that appeals are allowed "'almost as a matter of right." (App. Brief p. 6, *citing St. Joseph Lead Co. v. State Tax Comm'n,* 352 S.W.2d 656, 660 (Mo. 1962)). The key word in that argument by Appellants is "almost," as its use reveals that there is no appeal as a matter of right. In this matter, the right to appeal is limited by the statute specifically designed to control these situations, and the attempted appeal falls into the category of those which cannot be had.

such other questions. Missouri Courts have specifically recognized that the narrow scope of appellate issues in matters such as these necessarily precludes appeals from a confirmation of a benefits assessment, and this recognition provides binding authority for the Western District's determination to deny the Appellants' appeal. *See, e.g., Peatman v. Worthington Drainage Dist*., 176 S.W.2d 539, 545 (Mo. App. 1943); *Birmingham Drainage Dist. v. Chicago, B. & Q.R. Co.*, 202 S.W. 404, 406 (Mo. 1917).

Much of the case law which bolsters this conclusion interprets Chapter 242 of the Missouri Statutes concerning drainage districts. In enacting Section 245.130, the legislature borrowed language from statutes addressing similar activities and issues. The questions for appeal in levee district matters are similar to the questions for appeal deemed appropriate by the legislature in drainage district matters. § 242.280.5, RSMo. (1990). In fact, the legislature used identical language in addressing which questions could be determined on appeal from the judgment of the circuit court regarding the assessment of benefits and damages in both levee district and drainage district matters. The similarity of these two statutory chapters has been cited by Missouri courts as the basis for using case law interpreting one chapter as guidance for interpreting the other. *See, e.g., In re Tri-County Levee Dist*., 42 S.W.3d 779, 787 (Mo. App. 2001) (*citing J. A. Bruening Co. v. Liberty Landing Levee Dist*., 475 S.W.2d 125, 126 (Mo. 1972)) (stating "Our Supreme Court has stated the provisions in Chapter 245 of the Missouri Revised Statutes are substantially the same as the statutory provisions of Chapter 242 of the Missouri Revised Statutes").

Because the appeals provisions of the two statutes are identical, Missouri courts use case law interpreting the drainage district provisions to interpret the levee district provisions. *Id*.

Missouri courts have long held that strict compliance with the drainage district statute is crucial as "*there is no right of appeal from the judgment of a court approving the report of commissioners assessing benefits*, the right to appeal being limited to cases involving the amount of damages . . . ." *Peatman v. Worthington Drainage Dist*., 176 S.W.2d 539, 545 (Mo. App. 1943) (emphasis added). The Appellants are not appealing any issue other than the assessment of benefits; therefore, this Court cannot ignore the express language of the statute and hear an appeal when such right does not exist.

Where appellants have attempted to lead courts to new issues for appeal outside of the question of damages in drainage district cases, the Missouri Supreme Court has been unwilling to follow. In *Birmingham*, for instance, this Court engaged in a lengthy analysis of the very question now at issue and then declined to hear an appeal regarding benefits assessed. The Court reviewed the legislature's authority to assess and levy taxes, as well as the legislature's power to designate an agency such as a circuit court to do the same, and then addressed the propriety of an appeal of such assessments. *Birmingham*, 202 S.W. at 407.[3] The Court stated:

[3] The statutory language regarding questions on appeal at that time was identical to what is currently found in both the drainage district and levee district statutes.

> **We fail to see any constitutional or other reason why the intention of the Legislature, evident upon the face of this act, to confine our right of review in these cases to the assessment of damages upon appeal taken within the time provided by statute, should not be respected. The right of review in any case is purely statutory, and may, in cases coming within the purview of those provisions of the Code authorizing appeals and writs of error, be made available in either mode. The right to enact these statutes includes the right to repeal or modify them or to limit their application in any manner not inconsistent with some provision of the Constitution limiting the legislative power in that respect. In special proceedings quasi judicial in their nature, like the one before us, and providing affirmatively for a limited review, we see no reason why the legislative right should be extended beyond its terms, either with respect to its extent or the mode prescribed by the Legislature for its exercise.**

Id. at 408-09. The *Birmingham* decision was reinforced in *Peatman*, cited above, as well as in other Supreme Court cases. In *State ex inf. McAllister ex rel. Cole v. Norborne Land Drainage Dist. Co. of Carroll County*, 234 S.W. 344, 348-49 (Mo. 1921), for instance, the Court denied the Appellant's any further review by recognizing the legislature's ability to

limit such rights. Similarly, in *In re Yellow Creek Drainage District of Chariton County*, 240 S.W. 203 (Mo. 1922), the Court addressed a situation where, after a drainage district was dissolved by a circuit court, certain organizers of the district objected and appealed the dissolution to the Supreme Court. *Yellow Creek Drainage District*, 240 S.W. at 203. The Court rejected the appeal by first acknowledging that the right to appeal is purely statutory and then by stating that where a statute expressly limits the right of appeal, as in the drainage district statute, appeal can only be had on those issues specified. *Id*. at 206. These cases have never been overturned and this Court is now bound by its earlier decisions which validate the restricted availability of appeal in levee district matters.

4. **Appellants' Constitutional Jurisdiction Arguments Should Be Rejected As They Were Not Presented at the Earliest Opportunity and Because the Arguments Alter the Appellants' Earlier Basis for Their Claim in Violation of Supreme Court Rule 83.08**

In stating their claim that jurisdiction in this case is proper, the Appellants assert a multitude of new claims steeped in constitutional arguments which are presented for the first time. In the lower appellate court the Appellants claimed that jurisdiction to hear an appeal on benefits assessments was based simply on that court's general jurisdictional authority granted pursuant to Article V, Section 3 of the Missouri Constitution (Appellants' Brief to Western District, p. 1). At the appellate court level the Appellants failed to assert jurisdictional claims based on their constitutional and due process rights; the Appellants have, however, deemed it appropriate to now make claims based on the "fundamental right"

to appeal due process and constitutional violations of a circuit court (Appellants' Brief, p. 2). Though never maintained prior to their most recent brief, the Appellants are now claiming that appellate jurisdiction exists to address these "serious constitutional questions" regarding the circuit court's "constitutional transgression." (Appellants' Brief, p. 3). Unfortunately for the Appellants, these last-minute arguments concerning jurisdiction are barred both by a constitutional construction rule and Missouri Supreme Court Rule 83.08.

Missouri courts steadfastly adhere to the concept that constitutional claims must be raised at the earliest opportunity possible. "'Constitutional issues are waived unless raised at the earliest possible opportunity consistent with orderly procedure.'" *Weiss v. Rojanasathit*, 975 S.W.2d 113, 121 (Mo. 1998) (*quoting Hollis v. Blevins*, 926 S.W.2d 683 (Mo. banc 1996)). "The critical question in determining whether waiver occurs is whether the party affected had a reasonable opportunity to raise the constitutionality of the act or statute by timely asserting the claim before a court of law." *Dept. of Social Services, Div. of Child Support Enforcement v. Houston*, 989 S.W.2d 950, 952 (Mo. 1999) (*citing Callier v. Director of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989)). In this instance, the Appellants are only now asserting several claims invoking constitutional rights where they failed to earlier assert the same, despite the opportunity to do so. Appellants should have raised these claims at the Court of Appeals, which unquestionably provides an "orderly procedure" for doing so, but that court was not given the opportunity to consider them. This failure by the Appellants to fully state their case, and to instead reserve certain arguments

for another court, is a waste of judicial resources which offends and insults the public policy interest in avoiding such waste.

This late-ditch attempt to raise additional constitutional arguments also violates Supreme Court Rule 83.08(b), which states that a party's brief to this Court "shall not alter the basis of any claim that was raised in the court of appeals brief . . . ." Rule 83.08(b) (West 2003). The Appellants' new claims of jurisdiction are a gross departure from their previous claims of jurisdiction, and thus should be ignored or rejected to satisfy Rule 83.08's dictate.

Entertaining the appeal asserted by the Appellants in this matter would ignore the express statutory language controlling the issue and in turn render that statute meaningless. Allowing the appeal would also diverge from the statutory construct that the express mention of one thing implies the exclusion of another. *Birmingham*, a decision by this Court and on which the lower court based its determination, has never been overturned, and to do so now would require this Court to improperly stray from the authority which guides it. Finally, the Appellants' entire claim of jurisdiction is a blatant deviation from all of its prior claims, and Missouri law and Supreme Court Rules do not allow such eleventh-hour alterations. This Court should use this opportunity to settle the entire question of appellate jurisdiction in matters such as these by confirming its own previous decision and refusing to hear this appeal.

In addition, as to those arguments presented specifically by Appellants Wesley and Carol Seyller related to the exceptions which they filed on October 3, 2001 (LF 828), this Court's jurisdiction is limited to overturning the Trial Court's determination to allow such exceptions to be heard despite having been filed out of time. This Court is specifically barred from addressing the substantive issues of such exceptions, and this issue is addressed further in Section VI of the Argument.

Statements of Facts

The Levee District, the United States Army Corps of Engineers (the "Corps") and the City of Riverside, Missouri are working in concert to develop the Levee which will protect approximately 2400 acres of land within the Levee District (LF 1).[4] Protection afforded by the levee will avoid and mitigate future damage inflicted by flooding of the Missouri River, which in 1993 alone caused over $15,000,000.00 in damages and unemployment (LF 2).

The Levee District was created by the Circuit Court of Platte County, Missouri ("Trial Court") in accordance with Chapter 245, RSMo. (LF 1). That portion of the approximately 2400 acres within the levee district which is located in Platte County is entirely located within the City of Riverside (LF 1-2). The specific plan for construction of the levee was proposed in a Report of Engineer and Supplement to Plan for Reclamation (the "Plan") which was received by the Levee District, from its engineer, in March of 1999 (LF 2). Prior to the distribution of the Plan, the Levee District and the Corps entered into a projection cooperation agreement, dated September 23, 1997, which established the provisions of a cost-sharing agreement for the construction and finance of the levee (the "Project Cooperation Agreement") (LF 3). The Project Cooperation Agreement included

[4] References to the Legal File are noted as "LF," while references to the various transcripts are noted as "Tr. I" for the June 30, 1999 hearing and as "Tr. II" for the October 4, 2001 hearing. This reference system, in order to ensure consistency and ease of use, is borrowed from that used by the Appellants in their brief.

provisions concerning the funding of the project and the allocation of project costs to be paid by the local authorities and those to be paid by the Federal Government (LF 3). The "Local Share" of the project costs is financed by the City of Riverside, tax increment financing revenues enjoyed pursuant to the L-385 Redevelopment Plan approved by the Tax Increment Financing Commission of Riverside, Missouri, landowner participation payments and assessment bonds (LF 3-4). One component of the Plan involved the acquisition of certain property in order to secure the appropriate right-of-way for the construction of the levee and relocation of utilities (LF 28).

On April 21, 1999, the Trial Court received the Levee District's petition which asked the Trial Court to approve the Plan, to amend the boundaries of the Levee District, to appoint commissioners to appraise the property to be acquired and to determine the value of all land in the levee district, and to assess benefits and damages accruing to lands impacted by the Plan and to determine that the benefits of the Plan exceed the costs of constructing the levee (LF 5-6).

On June 30, 1999, the Trial Court held a hearing on the Levee District's petition (LF 254), and on July 13, 1999 the Trial Court entered an Order confirming the Levee District's compliance with Chapter 245, RSMo., amending the Levee District's boundaries, approving the Plan and appointing commissioners to appraise the property to be acquired and to assess the benefits and damages (LF 254, 260). At the June 30 hearing, the Levee District presented the testimony of several Riverside officials, members of the Levee District Board of Supervisors, and other individuals concerning the Plan (Tr. I 7, *et seq*.). One such official

offering testimony was Ann Daniels, the City Administrator for the City of Riverside (Tr. I 9). In her testimony, Ms. Daniels stated that the levee would produce benefits for the City of Riverside and its residents, including "nonmonetary" benefits for the public health and welfare and the enhanced possibility of future development and growth for the City (Tr. I 11-12).

The Levee District also offered the testimony of John Stacy, a real estate services consultant (Tr. I 181-182). Mr. Stacy reviewed the Plan and the project and performed a cost benefit analysis wherein he concluded that the benefits of the project would outweigh its costs (Tr. I 187). Mr. Stacy arrived at his conclusion using the market based land value method, and found that not only would the land benefit from an increase in property values (Tr. I 187), but that it would also benefit from increased commercial and industrial development as well as from a life and property protection standpoint (Tr. I 184, 189-190). Mr. Stacy's cost-benefit analysis report, referred to in his testimony (Tr. I 187) and included as Petitioner's Exhibit 20, addressed the benefits to be realized by the City and its landowners in the form of new capital improvements, increased real estate taxes, and more jobs and revenue to be realized from construction support. The Appellants were given the opportunity to cross-examine both Ms. Daniels and Mr. Stacy (Tr. 1 23-28, 190-191).

After the Trial Court entered a June 22, 2000 Judgment confirming its 1999 Order and taking into account the Amended Petition filed by the Levee District to reflect changes to the Plan (LF 666-670), the commissioners appointed by the Trial Court (the "Commissioners") issued their report (the "Commissioners' Report") on September 13,

2001 (LF 735). The Commissioners' Report, in the form required by Chapter 245, RSMo., described the parcels of property, and owners thereof, which were the subject of assessment, the acres to be assessed, the amount of benefits assessed, the type of interest held in the property, the value of the property taken, and the damages awarded other than for property taken (LF 736-764).

In the Commissioners' Report, signed by all three Commissioners, each Commissioner stated that they had taken their Qualifying Oath required by statute and that they did thereby, under oath, present the Commissioners' Report as their findings as to the assessment of benefits to certain landowners, and finally that they had "acted in all things in compliance with law and with the terms of the Order Appointing Commissioners" (LF 735).

On September 14, 2001, the Notice for Filing of Commissioners' Report was filed with the Trial Court (LF 768), and a Notice of Hearing, to be held on October 4, 2001, regarding the Commissioners' Report was also issued (LF 771). The date of publication of the Notice of Hearing was September 19, 2001 (Tr. II 23-24). Certain of the Appellants filed proper written exceptions to the Commissioners' Report prior to or on September 24, 2001 (LF 772-773, 776-777, 778-780, 781-787, 794-796), though the exception of Appellants Wesley and Carol Seyller was filed on October 3, 2001, constituting a filing out of time (LF 828). Despite this out of time filing, the Trial Court allowed the Seyller exceptions to be heard (Tr. II 139).

At the October 4 hearing on the Commissioners' Report, the Trial Court informed the various Appellants that it would conduct a summary proceeding, as required by statute, and that such summary proceeding would give the Appellants "an opportunity to make a record of such legal arguments, file affidavits, anything you wish to present except live testimony" (Tr. II 9). In addition, the Trial Court granted all Appellants, or "exceptors" as they were referred to in the hearing, a ten-day period in which to file additional or supplementary suggestions or affidavits in relation to their exceptions (Tr. II 139). The Trial Court also heard arguments by the Respondent which summarized the nature of the summary proceedings and the case law which established the rule that the assessment of benefits in a levee district matter is solely for the trial court to confirm, and not a jury question (Tr. II 71-79). The Trial Court was informed that the Commissioners dedicated two and half years to assessing the benefits and did so based on volumes of information, and that to second-guess their determination would be impractical and unfeasible (Tr. II 76-77). At the close of the hearing, the Trial Court again made it clear that all Appellants or "exceptors" would have the opportunity to file additional suggestions or affidavits, and that such suggestions or affidavits could speak to each and every issue addressed during that October 4, 2001 hearing and "[a]nything you [exceptors] want to cover" (Tr. II 93). The Trial Court defined the focus of the additional suggestions or affidavits to include any matter the Appellants saw fit to supplement.

Subsequent to the October 4, 2001 hearing, several Appellants filed suggestions and affidavits. Appellant Williams Pipe Line, in its various corporate incarnations, filed a six-

page affidavit addressing improvements to the company's utilities, the basic business of the pipe line company and the expected impact of the levee thereon (LF 868-873), a similar five-page affidavit (LF 874-878) and a second five-page affidavit (LF 879-883). Appellant Seyllers filed their own additional suggestions, complete with a 65-page appraisal and an additional 95-page appraisal as exhibits for the Trial Court's review (LF 893-958 and 960-1055). Appellants ProLogis Trust, Security Capital Industrial Trust and Kitterman Inc., used the Trial Court's ten-day filing period to file a motion for a review of the assessment of benefits (LF 1056-1068). Appellant Estate of Ed Young also filed sixteen pages of suggestions (LF 11069-1084). All of these suggestions, affidavits and other motions were received by the Trial Court prior to any ruling or order.

On October 23, 2001, after the October 15, 2001 deadline for additional suggestions or affidavits had passed, and after the affidavit of Commission chairman Edward Coulson was filed (*see* LF 1118-1119), the Trial Court entered its Order and Judgment Confirming Commissioners' Report (LF 1120-1126). Subsequent motions for rehearing and reconsideration filed by various of the Appellants were overruled by the Trial Court (LF 1260-1261). Notices of appeal were filed by the several Appellants separately and later consolidated by the Court of Appeals (LF 1191-1259, 1269-1278).

Points Relied On

I. SECTION 245.130 SPECIFICALLY PROVIDES A METHOD OF REVIEW AND CANNOT BE READ TO ALLOW ANY VARIANCE THEREFROM, AND THUS THE REVIEW DEMANDED BY THE APPELLANTS CANNOT BE HEARD.

Section 245.130, RSMo. (2001)

Birmingham Drainage Dist. v. Chicago, B. & Q.R. Co., 202 S.W. 404, 406 (Mo. 1917)

Heidrich v. City of Lee's Summit, 26 S.W.3d 179, 184 (Mo. App. 2000)

Summit Ridge Development Co. v. City of Independence, 821 S.W.2d 516, 519 (Mo. App. 1991)

II. THE APPELLANTS ARE ESTOPPED FROM CHALLENGING ANY IRREGULARITIES IN THE CONDEMNATION PROCEEDING BECAUSE THEY HAVE WITHDRAWN THEIR AWARD OF DAMAGES PAID INTO COURT BY THE RESPONDENTS.

City of Riverside v. Progressive Investment Club of Kansas City, Inc., 45 S.W.3d 905, 909 (Mo. App. 2001)

Jackson County v. Hesterberg, 519 S.W.2d 537, 545 (Mo. App. 1975)

State ex rel. State Highway Comm'n v. Howald, 315 S.W.2d 786, 788-89 (Mo. 1958)

III. THE PROCEEDINGS BEFORE THE TRIAL COURT WERE, BY THEIR STATUTORY DEFINITION, SUMMARY AND THUS WERE ADEQUATE

AND SATISFIED ALL REQUIREMENTS AND PROCEDURES UNDER CHAPTER 245, AND PRODUCED AN ADEQUATE BASIS ON WHICH THE TRIAL COURT PROPERLY CONFIRMED THE COMMISSIONERS' REPORT.

Section 245.130.2 RSMo., (2001)

Pavlica v. Director of Revenue, 2002 WL 417160, *2 (Mo. App. 2002)

IV. THOUGH APPELLANTS CLAIM TO HAVE BEEN DENIED THE OPPORTUNITY TO PRESENT SUBSTANTIVE ARGUMENTS REGARDING THE COMMISSIONERS FINDINGS, THE CIRCUIT COURT DID IN FACT PROVIDE SUCH OPPORTUNITIES WHICH APPELLANTS CHOSE TO IGNORE.

Cross v. Drury Inns, Inc., 32 S.W.3d 632, 635 (Mo. App. 2000)

Bartlett Trust Co. v. Elliott, 30 F.2d 700, 704 (E.D. Mo. 1929)

V. LEGISLATIVELY ENACTED AND PRESCRIBED PROCESSES FOR APPEALING TAX ASSESSMENTS ARE COMMONPLACE AND PROVIDE DUE PROCESS, ESPECIALLY WHERE JUDICIAL REVIEW OF SUCH ASSESSMENTS IS A FIXED COMPONENT OF SUCH A PROCESS.

Birmingham Drainage Dist. v. Chicago, B. & Q.R. Co., 202 S.W. 404, 406 (Mo. 1917)

Peyton v. Dept. of Social Services, Division of Family Services, 987 S.W. 2d 427, 428-29 (Mo. App. 1999)

Springfield Park Cent. Hosp. v. Dir. of Revenue, 643 S.W.2d 599, 600-01 (Mo. 1983)

VI. THE COURT LACKS JURISDICTION TO CONSIDER THE APPEAL OF APPELLANTS WESLEY AND CAROL SEYLLER AS THEY FILED THEIR EXCEPTION AFTER THE STATUTORY PERIOD FOR SUCH FILINGS HAD EXPIRED.

Section 245.125, RSMo. (2001)

Standard of Review

Because this Court does not have jurisdiction over the matter presented for review by the Appellants, the question of the appropriate standard of review is irrelevant. However, should the Court determine to take up the appeal asserted by the Appellants, it should grant the Trial Court the greatest level of deference possible. The decision of the Trial Court may be reversed on if arbitrary and unreasonable, and not even fairly debatable.

The action undertaken by the Trial Court to create the Levee District, and to then review and confirm the Commissioners' Report, is done pursuant to a delegation of power and authority by the Missouri Legislature. § 245.010 *et seq*., RSMo. (2001); *see also Birmingham Drainage Dist. v. Chicago, B. & Q.R. Co*., 202 S.W. 404, 406 (Mo. 1917) (stating that though legislature had authority to organize drainage district, it also had authority to delegate to an appropriate agency). Missouri decisional law states "[t]he legislature has the power to delegate its authority, even that which involves an exercise of discretion." *Bergman v. Mills*, 988 S.W.2d 84, 89 (Mo. App. 1999). When the legislature appropriately delegates its authority to an agency, the entrusted authority remains legislative in nature. *Birmingham Drainage Dist*., 202 S.W. at 406. Similarly, "[w]here the grant of power is clear, the detail for its exercise need be given only within practical limits." *AT & T Info. Systems, Inc. v. Wallemann*, 827 S.W.2d 217, 224-25 (Mo. App. 1992). Once these practical limits are set, the remaining determinations "may be left to the authorized agency delegated to accomplish the legislative purpose." *Id*. at 225.

Because the actions taken and determinations made by the levee district and the Commissioners, and ultimately approved by the Trial Court, in this matter are legislative in nature, those actions and determinations must be afforded great deference. "[A] court may reverse legislative acts only if arbitrary and unreasonable, meaning that the decision is not 'fairly debatable.'" *Summit Ridge Development Co. v. City of Independence*, 821 S.W.2d 516, 519 (Mo. App. W.D. 1991) (*citing City of St. Joseph v. Hankinson*, 312 S.W.2d 4, 8 (Mo. 1958); and *Binger v. City of Independence*, 588 S.W.2d 481, 485 (Mo. banc 1979)). In addition, because the statute established the practical guidelines for the Trial Court, it is for the Trial Court to determine the best method for accomplishing the legislative purpose and such determination merits great deference. *AT & T Information Systems, Inc.*, 827 S.W.2d at 225. Therefore, as long as the judgment of the Trial Court was supported by substantial evidence, was not against the weight of the evidence, and did not erroneously apply the law, it must be affirmed. *In re Fabius River Drainage Dist*., 35 S.W.3d 473, 480 (Mo. 2000); *see also Missouri Bottoms Levee Dist. v. Missouri Highways and Transp. Comm'n*, 2002 WL 417470,*1 (Mo. App. 2002). In addressing the Appellants' challenges to the sufficiency of the evidence on which the Trial Court based its confirmation, this Court must view such evidence "in a light most favorable" to the Trial Court's judgment and must disregard "all contrary evidence and inferences." *In re Fabius River Drainage Dist*., 35 S.W.3d at 480.

Argument

I. SECTION 245.130 SPECIFICALLY PROVIDES A METHOD OF REVIEW AND CANNOT BE READ TO ALLOW ANY VARIANCE THEREFROM, AND THUS THE REVIEW DEMANDED BY THE APPELLANTS CANNOT BE HEARD.

Section 245.130 cannot be read to allow an appeal or review on any issue which the Appellant desires, but is instead properly read to limit the review pursuant to the statutory dictates. "Where the legislature provides a method of review, that procedure is exclusive and must be used, or the court acts without jurisdiction." *Nash v. Director of Revenue*, 856 S.W.2d 112, 113 (Mo. App. 1993). In this matter, the Trial Court followed the legislatively prescribed method, and this Court should not hear any appeal therefrom as such is outside the process established by the legislature.

By enacting Chapter 245, the legislature obviously intended to establish a specific process for creating and operating levee districts. As stated in *Birmingham,* though the legislature may have the authority to engage in activities such as organizing drainage districts itself, it also has the authority to delegate such power to an appropriate agency. *See Birmingham,* 202 S.W. at 406; *see also Bergman v. Mills,* 988 S.W.2d 84, 89 (Mo. App. 1999). When the legislature delegates its authority to an appropriate agency, such authority remains legislative in nature. *Birmingham,* 202 S.W. at 406. "The assessment and levy of

taxes is a legislative function to be exercised in such manner and by such agencies as the Legislature may designate within the limits of its power." *Id*. at 407.

Legislative activity and determinations are generally afforded ample deference. Where legislative bodies make determinations regarding various issues, such determinations will not be overturned absent evidence that the determinations are unreasonable or inconsistent, or are based on arbitrary decisions which are not fairly debatable. *See, e.g.*, *Heidrich v. City of Lee's Summit*, 26 S.W.3d 179, 184 (Mo. App. 2000); *Summit Ridge Development Co. v. City of Independence*, 821 S.W.2d 516, 519 (Mo. App. 1991). The *Birmingham* court held that all matters involved in a drainage district organization, except the assessment of damages, were legislative in character, and that this dichotomy was the reason for the specific appeals provision. *Id*. at 408. The Court stated further that the appeals provision was likely designed to avoid unnecessary delay, dangerous working conditions and the potential to destroy the district which an appeal of the assessment of benefits would threaten. *Id*.

This Court, like the *Birmingham* court before it, is obligated to honor the legislature's establishment of the parameters for a cause of action which the legislature created, in this case, an exception to a commissioners' report. "The General Assembly is free to set the boundaries and procedures for any cause of action which it creates, and [courts] will only interfere in cases in which those procedures violate due process and other constitutional

guarantees."[5] *Sterneker v. Dir. of Revenue*, 3 S.W.3d 808, 810 (Mo. App. 1999) (*citing, e.g., Lunsford v. Dir. of Revenue*, 969 S.W.2d 833, 835 (Mo. App. 1998)). Based on these considerations, the *Birmingham* Court properly chose to acknowledge and follow the express legislative intent to limit the questions on appeal. "[W]hen the legislature has spoken on [a] subject, the courts must defer to its determinations of public policy." *Budding v. SSM Healthcare Sys*., 19 S.W.3d 678, 681 (Mo. 2000). If this Court determines to hear this Appeal, it will not only discount its own long-recognized levee district concerns and policy considerations regarding delay, workplace danger and inefficiency, it will also be leaping outside the Missouri Legislature's mandatory method of review and thereby will be asserting this Court's preferred public policy in the place of that of the Legislature.

[5] As discussed in Section III below, the process afforded the Appellants in this matter satisfied constitutional guarantees of due process as evidenced not only by the fact that certain of Appellants objections and exceptions were accepted by the Trial Court, but also by the case law precedent which declares that "[t]he full and complete opportunity accorded all objectors at the hearing on the commissioners' report assessing benefits, as has been often held, amply meets all requirements of due process." *Bartlett Trust Co. v. Elliott*, 30 F.2d 700, 704 (E.D. Mo. 1929). The opportunity to be heard at the hearing on the report must have been full and complete because the Appellants and others *were successful* in asserting certain complaints, objections and exceptions.

II. THE APPELLANTS ARE ESTOPPED FROM CHALLENGING ANY IRREGULARITIES IN THE CONDEMNATION PROCEEDING BECAUSE THEY HAVE WITHDRAWN THEIR AWARD OF DAMAGES PAID INTO COURT BY THE RESPONDENTS.

Even if the question of assessment of benefits was reviewable on appeal, the Appellants waived their right to such appeal by virtue of their withdrawal of their condemnation damages award from the Clerk of the Circuit Court. The act of withdrawing their award precludes the Appellants from challenging any part of the proceeding as irregular or unacceptable.

Missouri courts have recently held that "[w]here the owner of condemned land withdraws an award paid into the court for the owner's benefit as damages for appropriation of his property, the owner is estopped from challenging the right of the condemnor to condemn the property *or any irregularities from that part of the proceeding*." *City of Riverside v. Progressive Investment Club of Kansas City, Inc.*, 45 S.W.3d 905, 909 (Mo. App. 2001) (*citing State ex rel. State Highway Comm'n v. Howald*, 315 S.W.2d 786, 788-89 (Mo. 1958) (*emphasis added*). There is an even clearer depiction of the preclusive effect stemming from the withdrawal of an award, as it has also been held that where a party withdraws a condemnation award based on a commissioner's report, that party "is precluded and estopped from asserting on . . . appeal *any* irregularities in *any* proceeding that occurred prior to the time he made that withdraw." *Jackson County v. Hesterberg*, 519 S.W.2d 537, 545 (Mo. App. 1975) (*emphasis added*).

Many of the individual Appellants have in fact withdrawn their awards (See Respondent's Supp. LF 1-17; Appellants Intercontinental Engineering Manufacturing Corporation, Estate of Ed Young, Kitterman, Inc., and Prologis Trust and Security Capital Industrial Trust had withdrawn their awards as of October 7, 2002). This Court's prior determinations on this matter are steeped in the logic that "'[a] litigant should not be permitted to accept the fruits of a proceeding, and at the same time question the regularity thereof, for his own further self-aggrandizement.'" *State ex rel. State Highway Comm'n v. Howald*, 315 S.W.2d 786, 789 (Mo. 1958) (*citing Chicago Great Western R. Co. v Kemper*, 166 S.W. 291, 294 (Mo. 1914)). According to this Court, if an owner of condemned property expects to question the regularity of the portion of the condemnation proceeding outside the amount of damages, "he should not take down the allowance of the commissioners . . . ." *Id*.

Though property owners are expected by Missouri courts to suspend their withdrawal of their award where they intend to challenge the proceedings prior to the confirmation of the commissioners' report, the Appellants have chosen a different course. Here, the Appellants are assuming the exact position denounced by this Court: the Appellants have availed themselves of the rewards of the proceeding (by withdrawing their awards) and are at the same time attempting to challenge the proceeding's legitimacy. In fact, the combined award enjoyed by the Appellants pursuant to the proceeding which they are now challenging is $1,845,821.00 (LF 735-767). The Appellants are in effect enjoying the "fruits" of a process which they now decry as tainted. The enjoyment of those fruits, according to the

State ex rel. State Highway Comm'n v. Howald Court, estops one from challenging any proceeding occurring prior to the time of withdraw. In this matter, the proceedings challenged by the Appellants consist of hearings which took place prior and leading up to confirmation of the Commissioners' Report, subsequent to which the awards were withdrawn. Now, after the proceedings have taken place, and after ample opportunity to present arguments regarding the Commissioners' Report, the Appellants are attempting to blast holes in the very vehicle which delivered to them monetary benefits. Appellants ignore the fact that it was a *single* process conducted by the Trial Court which lead to the appointment of the Commissioners who assessed benefits and determined damages. The Commissioners filed a *single* report assessing benefits and determining damages. Appellants are now seeking to attack this process and this report while realizing and enjoying the damages awarded therein.

III. THE PROCEEDINGS BEFORE THE TRIAL COURT WERE, BY THEIR STATUTORY DEFINITION, SUMMARY AND THUS WERE ADEQUATE AND SATISFIED ALL REQUIREMENTS AND PROCEDURES UNDER CHAPTER 245, AND PRODUCED AN ADEQUATE BASIS ON WHICH THE TRIAL COURT PROPERLY CONFIRMED THE COMMISSIONERS' REPORT.

A. Despite the Appellants' Complaints to the Contrary, a Summary Proceeding, as Required by Statute, Was Appropriate.

In their brief, the Appellants complain about what they perceive as the Trial Court's failure to provide them with an appropriate opportunity to file exceptions to the Commissioners' Report during the statutorily prescribed summary proceedings. In fact, throughout their brief, Appellants consistently cite the "implicit" requirements of a "meaningful" summary proceeding. Though the Appellants attempt to supplement the statutory language, the reality is that RSMo. § 245.130 specifically, and without reverting to implications or innuendo, demands a summary proceeding. The statutory section never modifies or further expounds upon the summary proceeding requirement by use of the term meaningful,[6] nor does that statute discuss implied procedures or requirements. Instead, the statute specifically states that "[a]ll exceptions shall be heard by the court and determined in a ***summary manner*** so as to carry out ***liberally*** the ***purposes*** and ***needs*** of the ***district*** . . . ." § 245.130.2 , RSMo. (2001) (emphasis added).

While the Appellants would have this Court conjure implied meanings gathered by reading between the lines of the summary proceeding described in the statute, this Court is

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[6] The Appellants characterize the statutorily prescribed summary process for addressing exceptions to the Commissioners' Report as meaningless and suggest that the statute "implies" a "meaningful" hearing. In suggesting that this Court must attribute implied connotations to the statute in order to give it "meaning," the Appellants ask this Court to disregard the Missouri Supreme Court presumption that "the legislature does not enact meaningless provisions." *Bartley v. Special School Dist. of St. Louis County,* 649 S.W.2d 864, 867 (Mo. 1983) (reversed on other grounds).

best served by ascertaining the legislature's intent through considering "the plain and ordinary meaning of the words in the statute." *See In re Tri-County Levee Dist*., 42 S.W.3d 779, 784 (Mo. App. 2001). The statute calls for a summary proceeding, and mentions nothing about jury trials, extended discovery or other proceedings. "Where the legislative intent is made evident by giving the language employed in the statute its plain and ordinary meaning, [courts] are without authority to read into the statute an intent, which is contrary thereto." *Pavlica v. Director of Revenue,* 2002 WL 417160, *2 (Mo. App. 2002). Put more succinctly, this Court, and the Appellants, "'must be guided by what the legislature said, not by what the Court thinks it meant to say.'" *Dueker v. Missouri Div. of Family Services*, 841 S.W.2d 772, 775 (Mo. App. 1992) (*quoting Metro Auto Auction v. Director of Revenue*, 707 S.W.2d 397, 401 (Mo. banc 1986)).

The plain meaning of the word "summary" does not inspire thoughts of protracted trials, discovery proceedings or examination of witnesses. According to Black's Law Dictionary, "summary" is an adjective meaning "short; concise; immediate; preemptory, off-hand, without a jury; provisional; statutory. The term as used in connection with legal proceedings means a short, concise, and immediate proceeding." Black's Law Dictionary 1435 (6th ed. 1990). Given this definition, Appellants' argument that the applicable statute's call for a summary proceeding "implicitly" required a discovery phase, a bench trial and other general civil procedure features is not supportable. It could be that the Appellants are asking this Court to resort to a non-legal definition of summary, but that definition also indicates a much different proceeding than that which the Appellants desire.

According to Webster's Dictionary, the adjective "summary" means "performed or meted out speedily and unceremoniously." Webster's II New College Dictionary 1104 (1999). A speedy and unceremonious proceeding, despite the Appellants' contentions otherwise, does not logically include the discovery and bench trial which Appellants seek. From both a legal and layman's perspective, the proceedings undertaken by the Trial Court were much more in harmony with the summary proceeding required by statute than is that which the Appellants are demanding.

B. The Nature and Specifics of the Proceedings Chosen and Carried Out by the Trial Court was Appropriate and Adequate and Did Not Lack Any Required Components.

Notwithstanding the statute's plain and unmistakable call for a summary proceeding, the Appellants complain that they "were never afforded a bench or jury trial, or even an evidentiary hearing to present their Exceptions to the Trial Court" (Appellants' Brief 21). Though the Appellants complain about not having a jury trial and having been treated unfairly in the discovery management portion of this matter, the Trial Court merely followed the instruction of the statute in addressing the exceptions filed. Missouri courts view Chapter 245 as "a code unto itself" wherein the granting and withholding of ***all*** power and authority is provided. *See In re Tri-County Levee Dist.*, 42 S.W.3d 779, 787 (Mo. App. 2001). The Trial Court had absolutely no responsibility to provide a trial of any sort, nor was it obliged to follow whatever pattern of legal proceeding with which the Appellants were comfortable or of which they were desirous; instead, the Trial Court was to exercise its

discretion in reviewing the Commissioners' Report and hearing the exceptions thereto. "The Missouri Supreme Court defined 'summary manner' as 'forthwith and without regard to the established course of legal proceeding' . . . ." *Id.* at 788 (*citing Birmingham Drainage Dist.*, 202 S.W. at 408). "As such, the term 'summary manner' does not envisage the use of standard discovery mechanisms or jury trials." *Id*. Given the Trial Court's statutory freedom (confirmed by case law precedent) to determine the best method for carrying out the purposes and needs of the levee district, that court was well within its discretion to dictate the method of discovery and the character of the proceeding. *Id*.

C. Both the Basis on Which the Trial Court Confirmed the Report of the Commissioners and the Commissioners' Methods for Arriving at the Conclusions in Their Report Were Adequate and Sufficient.

The Appellants chastise the Trial Court for the procedure which it implemented in reviewing the Commissioners' Report and further for confirming the Report without an adequate basis. In addition, the Appellants take exception to the methodology the Commissioners employed in generating their Report. The Appellants have adopted these positions in seeming disregard of the strong foundation on which the Trial Court based it confirmation. The first foundation, which includes the Commissioners' Oath, the Commissioners' Report and the Affidavit completed by the Commission Chairman, Edward Coulson, has intrinsic or imputed credibility. The second piece consists of extensive testimony given at the June 30, 1999, hearing regarding the benefits of the levee and was subject to cross-examination by the Appellants.

In instances such as these where the Legislature has designated a certain agency to carry out certain activities including the appointment of commissioners, the work product of such commission is presumptively valid. A commissioner's report assessing benefits will not be overturned unless that report has no rational basis and is arbitrary, unreasonable, or capricious. *Tri-County Levee Dist*., 42 S.W.3d at 788. Similarly, other courts have found that unless the assessment of benefits is arbitrary and unreasonable, control over such activity should be left to the local authorities, which would include the subject Trial Court, the Levee District supervisors and the Commissioners. *See Beck v. Missouri Valley Drainage Dist. of Holt County*, 46 F.2d 632, 636 (8th Cir. 1931). The same presumption is afforded to other similar commissions. For example, the report of the Public Service Commission on a utility rate case is presumptively valid, and will only be reversed if it is arbitrary, capricious and without reasonable basis. *See State ex rel. Capital City Water Co. v. Missouri Pub. Service Comm'n*, 850 S.W.2d 903, 912 (Mo. App. 1993).

In this particular case, the confirmation of the Commissioners' Report, as well as the Report itself, was validly based on sufficient evidence. As indicated in the Commissioners' Report (LF 735), the Commissioners took their qualifying oath which required each Commissioner to vow to "faithfully and impartially discharge their duties as such commissioners." § 245.115, RSMo. (2000).

Though the Appellants insist otherwise, the Report filed by the Commissioners was in compliance with the requirements of the applicable statute and thus was an adequate basis for the confirmation by the Trial Court. The Report, executed by all three Commissioners

(LF 766), indicates that the Commissioners engaged in each of the activities required by statute (LF 735). Further, the chart generated by the Commissioners in carrying out their duties complies with the statutory requirements of Section 245.120(2) (LF 736). These recitations, given under oath, are adequate evidence that the Report did comply with applicable law.

This evidence was accompanied by a second body of evidence, that of the pre-report testimony from experts concerning the benefits of the levee. Given only cursory consideration by the Appellants, the June 30, 1999 hearing consisted of several witnesses, cross-examined by the Appellants, providing testimony wherein they arrived at the conclusion that the levee would provide numerous benefits, both economic and otherwise, to the benefited properties. This testimony provided ample evidence from which the Trial Court could make the statutorily required determination of the amount of benefits and that the levee's benefits outweigh its costs. For instance, Riverside City Administrator Ann Daniels testified that the levee project would benefit the City and its residents and landowners by virtue of "lots of nonmonetary things, as far as the public health and welfare" (Tr. I 11), and further by enhanced growth and development (Tr. I 11). Ms. Daniels also testified that construction of the levee would help to alleviate, mitigate and improve numerous public safety, quality of life and community morale concerns and issues (Tr. I 12-13).

John Stacy, a real estate project consultant tapped to analyze the benefits accruing from the levee project, also stated that the goal of the project was to "protect people and

property" as well as to allow enhanced development (Tr. I 184). Mr. Stacy's expert evaluation was not limited to the increase in property values, as in his cost-benefit analysis he stated "evaluating this project on land value increase only is just the beginning!" (Tr. I 187, Pet. Ex. 20, page 6). Mr. Stacy went on to identify benefits related to flood protection, increased real estates taxes and other tax and fee revenue, the positive impact of wages and building material purchases on the local economy and increased protection of jobs plus additional employment opportunities (Tr. I 187, Pet. Ex. 20, page 7). Similarly, Robert Dimmett, an engineer with the U.S. Army Corps of Engineers, testified concerning the construction of the Levee and offered evidence from which both the Trial Court and the Commissioners could determine the location of the Levee relative to the Appellants' property, the elevations of the property and the degree of flood protection provided (Tr. I 100-120, 136, Pet. Ex. 15).

Though Appellants lament their lost opportunity to question in court those who provided the information on which the Commissioners' Report was based, they inexplicably ignore the fact they were afforded the opportunity to, and in fact did, cross-examine the witnesses which provided the testimony supporting the benefits attributed to the levee project (for cross-examination of Ann Daniels, *see* Tr. I 24-27; for cross-examination of John Stacy, *see* Tr. I 190-191; for cross-examination of Robert Dimmett, *see* Tr. I 121-135). The Appellants were also given the opportunity to present any evidence they saw fit at that hearing, though none took advantage of the opportunity (Tr. I 206-207). Given that the Appellants chose not to explore to any depth the reasoning or logic of the witnesses

supplying the Commissioners with vital information when given the opportunity in open court, it is inappropriate to now allow them to subsequently claim the opportunity was never presented.

Despite the adequacy of the evidence, and the fact that the Appellants had the opportunity to challenge it in open court and to present their own evidence, the Appellants claim that the Trial Court did not have sufficient grounds on which to confirm the Report, and want this Court to revisit the evidence and testimony given and to then overturn the confirmation of the Commissioners' Report.

In asserting this position the Appellants are ignoring not only the substance of the evidence and testimony presented to the Trial Court, but also the precedent that evidentiary and factual evaluations of trial courts receive considerable deference. *Friedman v. Friedman*, 965 S.W.2d 319, 322 (Mo. App. 1998) (*citing In re Marriage of Fry*, 827 S.W.2d 772, 775-76 (Mo. App. 1992). Furthermore, the Appellants are in essence disregarding the testimony given at the June 30, 1999 hearing which established the benefits to be recognized through construction of the levee, and do not address the Trial Court's superior ability to determine the credibility of the witnesses at that hearing. By statute the Trial Court is required to address the cost versus benefits of the levee district, and such issue was addressed during John Stacy's testimony in the June 30, 1999 hearing (Tr. I 184-190); the Trial Court presumably determined such evidence to be credible because it ruled that the benefits of the levee outweighed its costs (LF 1125). This determination by the Trial Court deserves great deference. "In a judge-tried case, credibility of the witnesses and the weight

to be given their testimony are matters for the judge to decide. [An appellate court] will not substitute [its] judgment for the judge's on credibility issues in such cases." *Miller v. Secura Ins. and Mut. Co. of Wisconsin*, 53 S.W.3d 152, 159 (Mo. App. 2001) (*citing Superior Gearbox Company v. Edwards*, 869 S.W.2d 239, 244 (Mo. App.1993)); *see also Springfield Land And Development Co. v. Bass*, 48 S.W.3d 620, 624 (Mo. App. S.D. 2001) (holding that the appellate court defers to the factual findings of the trial judge, who is in a superior position to assess credibility). While the same deference regarding credibility of evidence is limited in its application to written evidence such as affidavits, *In re Wintermann's Estate*, 492 S.W.2d 763, 767 (Mo. 1973), the Trial Court is still entitled to draw reasonable inferences from testimony, and such inferences are to be granted appellate deference. *First Nat. Ins. Co. of America v. Clark*, 899 S.W.2d 520, 521 (Mo. 1995) (*citing Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). Any inferences regarding the amount of benefits attributable to the levee drawn by the Trial Court from the Commissioners' Report, Commissioners' Oath or testimony on June 30, 1999 must credited with due deference here.

The Appellants point out several specific findings of the Trial Court which the Appellants characterize as lacking "the slightest support." For instance, the Appellants take exception to the Commissioner's finding that none of the Commissioners violated the residency, nepotism or competency requirements of the statute, as well as the finding that Commissioners were provided with appropriate lists of lands affected (Appellants' Brief,

pp. 33-34).[7] Although the Appellants may believe otherwise, there actually is support for these findings in the very Commissioners' Report that the Trial Court confirmed. All of the Commissioners, expressly under oath, stated that they acted in compliance with all laws (LF 735). This oath and statement was evidence before the Trial Court when it made its decision to confirm the Report. In addition to the black-and-white under-oath promise from the Commissioners that they complied with all applicable laws, the Trial Court was empowered to draw inferences of such compliance and such inferences merit appellate deference. *First Nat. Ins. Co. of America*, 899 S.W.2d at 521. Therefore, the Trial Court did have an evidentiary basis for its findings, namely the statutorily required and prescribed Commissioners' Report, and thus such determination was appropriate.

The Appellants' arguments ignore the larger picture, that being the accuracy of the benefits assessed and the finding that the benefits of the levee outweigh its costs, and instead concentrate solely on the process. This concentration is misplaced, as "[o]n review, the

[7] The Appellants also point out excerpts from the findings concerning the accompaniment of the Secretary of the Board of Supervisors as well as the nonconsideration and then the consideration of certain items. It should be noted that the Appellants do not attempt to indicate how such findings had any effect or bearing whatsoever on their rights or claims, but instead seem content to point out that the Trial Court relied solely on the Commissioners' Report. Even more significant, the Appellants failed to present any evidence to the Trial Court that any of the sworn statements of the Commissioners were untrue and offer no such evidence now.

primary concern is the correctness of the result in the trial court, not the route taken to reach it." *Ludlow v. Ahrens*, 812 S.W.2d 245, 249 (Mo. App. 1991) (*citing Walker v. Walker*, 631 S.W.2d 68, 71 (Mo. App. 1982)).

IV. THOUGH APPELLANTS CLAIM TO HAVE BEEN DENIED THE OPPORTUNITY TO PRESENT SUBSTANTIVE ARGUMENTS REGARDING THE COMMISSIONERS' FINDINGS, THE CIRCUIT COURT DID IN FACT PROVIDE SUCH OPPORTUNITIES WHICH APPELLANTS CHOSE TO IGNORE.

In arguing that the procedure followed by the Trial Court was inappropriate and deprived them of the occasion to present opposition to the Commissioners' Report, the Appellants fill twelve full pages of brief with unsubstantiated protests and criticisms which were based upon only a single citation to any sort of rule of law or other mention of legal precedent (Appellants' Brief Section II). Rather than employ Missouri law as the foundation of their second point relied on, the Appellants instead resort to arguing their view of the facts of the case and ignore, or summarily dismiss as inadequate, the Commissioners' Oaths, the Order of the Trial Court, the Commissioners' Report and other documents relied upon by the Trial Court. The Appellants also fail to mention that though given the opportunity to file exceptions to the Commissioners' Report as well as the opportunity to challenge the exact numbers provided in black and white in such Report based on the Appellants' own appraisals, conclusions and other reasoning, the Appellants instead determined to complain about the process while ignoring the substantive issues.

When before the Trial Court, the Appellants adopted a similar strategy even though they in effect elected to rest on the pleadings where they were given the opportunity to controvert the evidence presented by the Levee District. Such an election is improper, especially in light of the fact that the Appellants have attempted at one point in their brief to characterize the Trial Court's proceeding as substantially similar to a summary judgment proceeding (Appellants' Brief, pp. 22-24). If the lower court proceeding was in fact akin to a summary judgment motion, the Appellants, who would presumably take the position of the non-movant, did not satisfy their obligation because a non-movant "'may not rest upon the mere allegations or denials of his pleading,'" and instead must "'by affidavits or as otherwise provided in Rule 74.04 . . . set forth specific facts showing that there is a genuine issue for trial.'" *Cross v. Drury Inns, Inc.*, 32 S.W.3d 632, 635 (Mo. App. 2000) (*quoting ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371, 381 (Mo. banc 1993)). The Appellants for the most part did not attempt to set forth any evidence controverting the Commissioners' Report, but instead complained about the process for arriving at the Report's conclusion.

The Appellants claim that they were not given adequate opportunity to voice their exceptions. In making this claim, the Appellants conveniently choose to ignore the fact that they were given notice of the hearing at which their exceptions were to be filed and heard and in fact did file such exceptions. Similarly, the Appellants here disregard the Trial Court's permission to file additional affidavits and suggestions to support their exceptions, though the Appellants did take advantage of such authorization. In their brief Appellants

predict the arguments to be made by the Respondent: that the Respondent would point out that several of the exceptions, filed and heard in what the Appellants consistently couch as a meaningless hearing, were in fact successful (Appellants' Brief p. 29, n.12). The Respondent, hopefully to the satisfaction of the Appellants, hereby brings to this Court's attention that very fact: several of the exceptions filed *were* granted by the Trial Court (LF 858-859). It may be that the Appellants are upset that not all exceptions were granted, or it may be that the Appellants view the exceptions granted to be as "meaningless" as the proceeding which they so voraciously bemoan. Regardless of the true core of the Appellants' dissatisfaction, the fact that some of the landowners persuaded the Trial Court to accept their exceptions proves the adequacy of the proceedings. To claim that due process was not given where the very process complained of produced findings and adjustments in the favor of the complainant seems somewhat disingenuous and furthermore ignores the law. "The full and complete opportunity accorded all objectors at the hearing on the commissioners' report assessing benefits, as has been often held, amply meets all requirements of due process." *Bartlett Trust Co. v. Elliott*, 30 F.2d 700, 704 (E.D. Mo. 1929). Acceptance of an objection and argument made by a party at a hearing, and altering findings in favor of that party, is undoubtedly one of the primary characteristics which marks a "full and complete opportunity" to object to the subject report afforded by due process.

V. LEGISLATIVELY ENACTED AND PRESCRIBED PROCESSES FOR APPEALING TAX ASSESSMENTS ARE COMMONPLACE AND PROVIDE DUE PROCESS, ESPECIALLY WHERE JUDICIAL REVIEW OF SUCH ASSESSMENTS IS A FIXED COMPONENT OF SUCH A PROCESS.

That Section 245.130.4 establishes a specific method for review regarding the assessment of benefits in a levee district, which will ultimately be recouped as a tax assessment, is not uncommon. When legislative authority is delegated, the method established by the delegator for reviewing the exercise of the power must be followed. *Birmingham Drainage Dist*., 202 S.W. at 408-09. This same type of delegation and specific review is prevalent in a variety of tax assessment issues. For example, Missouri statutes establish specific processes for review of tax assessments in cases involving the assessment of property taxes, *see* § 137.275, RSMo. (2000) and § 138.430.1, RSMo. (2000); the assessment of general taxes, including business license taxes and use taxes, *see* § 139.031.1, RSMo. (2000); and the assessment of personal income taxes, *see* § 143.631.1, RSMo. (2001 elec. update). The same type of specific process, including a limited appeals provision, can also be found in Missouri statutes addressing state benefits. *See e.g., Peyton v. Dept. of Social Services, Division of Family Services,* 987 S.W. 2d 427, 428-29 (Mo. App. 1999) (rejecting appeal because issue on appeal was not one of five specifically enumerated issues to which there was a right to appeal).

Although the tax assessment review statutes discussed above provide methods similar to that found in levee district matters, a levee district appeal is distinct from such methods in

one crucial manner: it includes a judicial review component. Whereas the property, business and income tax assessment procedures provide purely administrative reviews and thus leave open the possibility of judicial review upon exhaustion of the administrative process, the levee district review procedure includes a judicial review at the end of its process. Therefore, no further judicial review is required. In fact, the general right to a review of an administrative procedure granted by Section 536.100, RSMo., would not apply in the context of a levee district review. "[W]here our legislature provides specifically for judicial review of a particular administrative agency's action, Chapter 536 would not be applicable." *State ex rel. Missouri Dept. of Labor and Indus. Relations v. Lasky*, 959 S.W.2d 872, 873 (Mo. App. 1997) (*citing Brogoto v. Wiggins*, 458 S.W.2d 317, 319 (Mo.1970)). Here, the legislature provides a judicial review, under Section 245.130.4, of what amounts to a determination by an agency,[8] and thus there is no need for, nor any right to, further judicial review.

Because the legislature specifically provided the method of review in a matter such as that at hand, courts reviewing these types of matters have found that hearings such as that enjoyed by the Appellant are sufficient to satisfy due process requirements. Recognizing that due process is a constitutionally guaranteed right, Missouri courts have still found that

[8] The *Birmingham* Drainage *Dist*. Court referred to the legislature's ability to delegate organization power to an appropriate "agency." *Birmingham Drainage Dist*., 202 S.W. at 406. Here, that agency is the Levee District, its Board of Supervisors, and the court-appointed Commissioners.

if a "statute provides a remedy and a procedure to be followed, it must be complied with." *Springfield Park Cent. Hosp. v. Dir. of Revenue*, 643 S.W.2d 599, 600-01 (Mo. 1983) (*citing Gothard v. Spradling*, 586 S.W.2d 443 (Mo. App.1979)). The statute at issue does provide an adequate procedure because it affords affected property owners both notice and an opportunity to be heard regarding the assessments. *See Beck v. Missouri Valley Drainage Dist. of Holt County*, 46 F.2d 632, 636 (8th Cir. 1931).

VI. THE COURT LACKS JURISDICTION TO CONSIDER THE APPEAL OF APPELLANTS WESLEY AND CAROL SEYLLER AS THEY FILED THEIR EXCEPTION AFTER THE STATUTORY PERIOD FOR SUCH FILINGS HAD EXPIRED.

Appellants Wesley and Carol Seyller filed their exceptions to the Commissioners' Report in a manner which does not comply with the statutory provisions which plainly establish the proper period and method for filing exceptions. Despite this noncompliance, the Trial Court allowed the exceptions to be filed and heard, and this Court must now reverse the decision of the Trial Court which improperly permitted those exceptions to be heard.

Under the levee district statute, any landowner within a levee district may file exceptions to a commissioners' report within ten (10) days after the last day of publication of the notice required to be published by statute Section 245.125. § 245.130.1, RSMo. (2001). Section 245.125 requires the clerk of the circuit court forming the levee district to

give notice of the filing of the commissioners' report by publishing notice of such filing "once in some newspaper published in each county in the district." § 245.125, RSMo. (2001). In this matter, the sole required notice was published on September 19, 2001 (Tr. II 24). Therefore, all exceptions were to be filed before September 30, 2001.

Despite this deadline, the Seyllers filed their exceptions on October 3, 2001, a date clearly beyond the statutory deadline (LF 828). Thus, Appellants Wesley and Carol Seyller filed their exceptions late and their filings should not have been allowed by the Trial Court.

Appellants Wesley and Carol Seyller attempted during the October 4, 2001 hearing to establish that the ten-day period referenced in the statute concerns notice by mailing, rather than by publication (Tr. 126). This is not the case, however, as the statute clearly references a "publication" under Section 245.125, and the only "publication" referenced in Section 245.125 is a publication in a newspaper. § 245.125, RSMo. (2001). The only instance where a mailing is mentioned in Section 245.125 is the requirement that the commissioners mail a notice within one week of filing the report. § 245.125, RSMo. (2001). This notice provision is obviously distinct from the published notice provision, regardless of the Appellants' attempt to cast the two as interchangeable. The Seyllers also apprised the Trial Court of the short notice the Seyllers gave their attorneys to prepare their exceptions and the fact that the Seyllers did not receive actual notice through the newspaper publication (Tr. II 128-129). This argument again ignores the very clear deadline established by the statute which does not make any provision for instances where an potential "exceptor" may not have actually read the notice required by statute. The Seyllers

seem to be stating that the Commissioners and the Levee District should have engaged in further or additional efforts to notify them, assumedly efforts beyond the publication and the notice mailed to, and received by, the Seyllers in compliance with statutory requirements (Tr. II 128). However, notice in addition to that received, both constructively and actually, by the Seyllers is not required as Missouri courts have found that such notice in levee district matters is sufficient. *See Tri-County Levee Dist*., 42 S.W.3d at 783 (noting that notice published in newspaper and mailed to landowners whose names and addresses appeared in the assessors' records was sufficient). Although the Seyllers filed their exceptions after the deadline and despite the adequate notice they received, the Trial Court determined that the "spirit" of the statute indicated that a late filing should be allowed (Tr. II 139). If a timely exception is not filed, the Circuit Court lacks jurisdiction to consider any complaint about the Commissioners' Report. Therefore, the Trial Court's ruling allowing Appellants Wesley and Carol Seyller to file out of time must be reversed. This Court's jurisdiction is limited to directing the Trial Court to dismiss the exceptions of the Seyllers.

Conclusion

Missouri statute specifically provides the questions which are appropriate for appeal in Chapter 245 proceedings, and the question for appeal presented by the Appellants in this matter is not an identified appealable issue. In addition, the Appellants waived their right to challenge any perceived deficiencies or irregularities in the condemnation proceedings when they withdrew their award from the Circuit Court, and thus this Court does not have jurisdiction to entertain an appeal which has been waived. Therefore, this appeal should be

dismissed. Furthermore, the Trial Court's confirmation of the Commissioners' Report was based on sufficient evidence presented to it in a full court hearing as well as at a statutorily prescribed summary hearing, and thus the Appellants were granted sufficient due process to allow this Court to affirm the Circuit Court's Order.

Respectfully submitted,

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Certificate of Compliance

Matthew D. Kitzi, attorney for Respondent, whereby certifies that he has complied with Rule 55.03 Mo. R. Civ. P., that this brief is in compliance with the limitations contained in Rule 84.06(b), that this Respondent's brief contains 13,106 words, that the brief was prepared using Microsoft Word in 13 point font and in Times New Roman. Pursuant to Rule 84.06(g), Mo. R. Civ. P., the accompanying disk has been scanned for viruses and it is virus free.

_____

Matthew D. Kitzi

Certificate of Mailing

I hereby certify that two (2) copies of the above and foregoing Respondent's Brief was mailed via first class mail this 8th day of August, 2003 to:

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APPENDIX

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